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In the

Supreme Court of the United States

October Term, 1965

THORNTON G. DEWEY,

Petitioner,

v.

THE AMERICAN NATIONAL BANK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas

BRIEF IN OPPOSITION FOR RESPONDENTS, W. D. OWEN AND DERRELL HENRY

H. A. BERRY,
P. O. Box 550,
Amarillo, Texas,

CLAYTON HEARE,
P. O. Box 550,
Amarillo, Texas,

HARLOW SPROUSE,
P. O. Box 550,
Amarillo, Texas,

Attorneys for Respondents, W. D. Owen and Derrell Henry.

WARLICK PRESS, INC.—2363 VALDINA STREET—DALLAS—ME 1-3130

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas is reported at 382 S.W. 2d 524 (App. A of Petition omits two paragraphs of the opinion, found at 382 S.W.2d 527, Column 1, second and third full paragraphs).

JURISDICTION

The jurisdiction as claimed by petitioner is challenged. Petitioner asserts jurisdiction on the ground that he has set up and claimed a right to recover double usurious interest paid given him by a statute of the United States, 12 U.S.C.A., §§ 85 and 86 (App. K and L of Petition). Petitioner has not,

in fact, set up any right against any of the respondents given him by said statutes.

To begin with, the respondents filing this brief are individuals not encompassed by the Federal statutes involved. Further, while petitioner made mention of the Federal statutes in his trial pleading, the facts pleaded by him clearly did not claim any right under the Federal statutes, it appearing from his pleading itself that the respondent bank never received any money at all from this transaction, either principal or interest. The statutes involved, and particularly 12 U.S.C.A., § 86, require the taking, receiving, reserving or charging of interest by a national bank as a prerequisite to any right arising by virtue of such statute. Interest must actually have been "paid" to the national bank before any right under the statute is created. *Haseltine v. Central National Bank*, 183 U.S. 132, 22 Sup. Ct. 50, 46 L. Ed. 118 (1901).

Neither the opinion (App. A of the Petition) nor the judgment of the court below (App. G of the Petition) indicates that any Federal question has been passed upon. Petitioner has not sustained his burden of showing that he raised such a Federal question by specifying the stage in the proceedings in each court at which, and the manner in which, the Federal questions sought to be reviewed were raised. Rule 23.1.(f), Supreme Court Rules.

QUESTIONS PRESENTED

Respondents cannot accept any of the five questions presented in the Petition as proper questions under this

record. Respondents feel that one question only was presented in the court below, as follows:

> Is a loan for the maximum allowable rate of interest made usurious by the additional collection of a finder's fee paid to a third person for services rendered in procuring a lender when the lender, although aware of the commission being paid to the third party, does not share in it, receive any benefit from it or require it as a condition to making the loan?

STATUTES INVOLVED

The statutes which petitioner asserts are involved are 12 U.S.C.A., §§ 85 and 86 (App. K and L of the Petition) and the Texas statutes bearing on usurious interest, Articles 5069, Vernon's Annotated Civil Statutes (App. H of the Petition), 5071, Vernon's Annotated Civil Statutes (App. I of the Petition) and Article 5073, Vernon's Annotated Civil Statutes (App. J of the Petition).

STATEMENT

The statement contained in the opinion of the court below (App. A of the Petition) is a fair and correct one. The statement contained in the Petition is challenged as being somewhat misleading. For example, the statement is made that the petitioner, Dewey, borrowed $100,000.00 from the defendant, Henry, who also retained a $5,000.00 commission. This implies that Henry was the lender, which of course he was not. The lender was the respondent, Owen.

We here point out that in the statement contained in the Petition, petitioner admits that the bank had no connection with the loan except that it loaned to Owen, the

lender in the transaction in question, $60,000.00 with which Owen was able to make the $100,000.00 loan in question. The loan from the bank to Owen was, however, a completely separate transaction, was a short term loan and was repaid by Owen within a few months from the date it was made. The respondent, The American National Bank of Amarillo, received no payment of any kind, either principal or interest, on the loan upon which petitioner based his lawsuit.

REASONS FOR DENYING THE WRIT

The primary reason for denying the writ is given in a preceding paragraph, that being the lack of jurisdiction of this Court under this record. There is no Federal question presented at all. No Federal right was ever set up or claimed by the petitioner. True, petitioner did make the statement in his trial pleading in the court of first instance that he claimed some right under the national bank usury statute, but the facts as pleaded by petitioner did not support that conclusion and showed affirmatively that he had no right under such Federal statutes. The respondent bank received no interest from petitioner, either directly or indirectly. There are, however, additional reasons why the writ should be denied.

I.

THERE IS NO SUBSTANTIAL QUESTION OF FEDERAL LAW

No Federal or state statute has been called into question by the court below, and no Constitutional issues are involved.

The sole jurisdictional ground alleged by petitioner is that he had claimed and set up a right granted by a Federal statute, 12 U.S.C.A., § 86. A right under §§ 85 and 86 of Title 12 arises only when a greater rate of interest has been charged by a national bank than allowed for associations organized or existing in the state in which the national bank is located, under the laws of such state. Aside from the fact that the respondent national bank received no interest at all from this transaction and therefore could not have been liable under the Federal statute, the question of whether there is usury in the transaction at all must depend upon whether the transaction is usurious under the appropriate state law. The true construction of the state legislation is a matter of state jurisprudence, the act of Congress involved here involving not a right of the national courts to determine adversely to the state courts what is the rule as to the interest prescribed by state law, but only the right to see that such rule is equally enforced with respect to the national banks and the state banks. *Union National Bank v. Louisville, etc. Railway Company*, 163 U.S. 325, 16 Sup. Ct. 1039, 41 L. Ed. 177 (1896). It is, therefore, necessary for the state court to make the judicial determination as to whether a particular transaction is usurious. This determination has been made by the court below and that court's judgment therefore rests upon a non-Federal ground. Even if it could be said to rest upon a Federal ground, it being a matter primarily concerned with state law, that Federal ground would not be of sufficient importance to grant this writ.

II.

THE DECISION BELOW IS CLEARLY CORRECT

While there were minor disputes and contradictions in the evidence presented below, the undisputed evidence clearly compelled the holding by the state court that there was no usury in this loan transaction, no usurious interest collected by anyone, and that petitioner was entitled to no relief. Prior holdings of Texas appellate courts were directly in point, as demonstrated by the following cases: *Noel v. Panhandle Building & Loan Association*, 85 S.W. 2d 773 (Tex. Civ. App. 1935, error ref.); *Nevels v. Harris*, 129 Tex. 190, 102 S.W. 2d 1046 (1937); *Great Southern Life Ins. Co. v. Williams*, 135 S.W. 2d 241 (Tex. Civ. App. 1940, error dism., judg. corr.); *National Life Ins. Co. v. Schroeder*, 94 S.W. 2d 868 (Tex. Civ. App. 1936); *Trinity Fire Ins. Co. v. Kerrville Hotel Company*, 129 Tex. 310, 103 S.W. 2d 121, 110 A.L.R. 442 (1937); *Graham and Locke Investments, Inc. v. Madison*, 295 S.W. 2d 234 (Tex. Civ. App. 1956, error ref., n.r.e.); *Sales v. Mercantile National Bank at Dallas*, 89 S.W. 2d 247 (Tex. Civ. App. 1935, error dism.); *Hughes v. Security Building & Loan Association*, 62 S.W. 2d 219 (Tex. Civ. App. 1933); *Ballard v. Shock*, 91 S.W. 2d 385 (Tex. Civ. App. 1936).

Petitioner seems to make the complaint that the trial court erred in not instructing a verdict against him. We agree, but we are unable to see how petitioner has been

denied due process by not having a verdict directed against him.

Petitioner complains that the Court of Civil Appeals did not decide the questions presented to it, but when that Court's opinion is read in connection with petitioner's brief in that Court (Appellant's Brief, Court of Civil Appeals) it is readily seen that the Court of Civil Appeals did just what it said it had done, in the last paragraph of its opinion:

> "* * * We believe what we have said completely disposes of all legitimate points raised by appellant, many of which were repetitious. All purported points not specifically mentioned are hereby overruled and the judgment of the trial court is in all things affirmed."

Rule 451, Texas Rules of Civil Procedure (App. D of the Petition) requires the Court of Civil Appeals to decide all issues "presented to them by proper assignments of error". The most cursory examination of petitioner's brief in that Court shows that many of them were not proper assignments of error, and without question the Court of Civil Appeals was lenient in considering as many of them as were considered. *Phillips Petroleum Company v. Thomas*, 167 S.W. 2d 571 (Tex. Civ. App. 1943, error ref.); *Texas Reserve Life Ins. Co. v. Texas Rehabilitation Center of Gonzales Warm Springs Foundation, Inc.*, 332 S.W. 2d 403 (Tex. Civ. App. 1960); *McKnight v. Renfro*, 371 S.W. 2d 740 (Tex. Civ. App. 1963).

As for petitioner's argument that Derrell Henry, Vice-President of The American National Bank, violated a criminal statute, the answer is threefold: First, no such statute

was violated; secondly, petitioner seeks no right under that statute, nor did he seek any such right in the courts below; and this is a civil case, not a criminal case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

H. A. Berry,
P. O. Box 550,
Amarillo, Texas,

Clayton Heare,
P. O. Box 550,
Amarillo, Texas,

Harlow Sprouse,
P. O. Box 550,
Amarillo, Texas,

Attorneys for Respondents,
W. D. Owen and Derrell Henry.